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Supreme Court, U.S.
FILED
DEC 18 2006
OFFICE OF THE CLERK

(3)

No. 06-5618

IN THE

Supreme Court of the United States

MARIO CLAIBORNE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE SENTENCING PROJECT AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE SENTENCING PROJECT AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

The Sentencing Project and the American Civil Liberties Union respectfully submit this brief *amici curiae* in support of the petitioner in this case.[1]

INTEREST OF *AMICI CURIAE*

The Sentencing Project is a non-profit organization dedicated to promoting rational and effective public policy on

[1] Pursuant to Rule 37, a blanket letter of consent from the petitioner has been filed with the Clerk of the Court. A letter of consent from the respondent United States authorizing the filing of this brief is also on file with the Clerk. Pursuant to Rule 36, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici curiae* and their counsel, made a monetary contribution to the preparation or submission of the brief.

issues of crime and justice. Through research, education, and advocacy, the organization analyzes the effects of sentencing and incarceration policies like those at issue in these cases, and promotes cost-effective and humane responses to crime. The Sentencing Project has produced a broad range of scholarship assessing the effects of federal crack cocaine policy, and members of its staff have been invited to present testimony before Congress, the United States Sentencing Commission, and a number of professional audiences.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 550,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Like the United States Sentencing Commission, the ACLU has long taken the position that the crack/cocaine sentencing disparity is irrational in design and discriminatory in effect. This case illustrates that problem and thus raises issues of significant concern to the ACLU and its members.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals violates *Booker v. United States*, 543 U.S. 220, 259 (2005), by requiring district courts to presume that sentences imposed within the ranges identified by the United States Sentences Guidelines ("the Guidelines") are reasonable and by requiring district courts to identify extraordinary circumstances in order to justify significant variances from those ranges. The decision recreates the pre-*Booker* federal sentencing regime, under which district courts were required to select a Guidelines-range sentence in the vast majority of cases.

The district court, by contrast, engaged in precisely the kind of individualized sentencing analysis a faithful reading of *Booker* not only permits, but requires. The district court correctly calculated the Guidelines range and considered that range before ultimately deciding, for a variety of reasons, to

impose a sentence below that range. The sentence it imposed was reasonable under *Booker*.

Although we agree with petitioner that the district court's sentence could be justified solely by reference to the § 3553(a) factors a district court is required to consider in *any* case, we write separately to explain why the district court's sentence is particularly reasonable because this is not just any case. It is instead a case involving a first-time, non-violent, and low-level crack cocaine defendant. Long before *Booker*, courts, commentators, and even the United States Sentencing Commission ("Commission" or "U.S.S.C.") recognized that federal drug laws impose disproportionately harsh—and, ultimately, misguided—sentences on a defendant like Mr. Claiborne.

Since 1986, various federal sentencing schemes have imposed a 100:1 "weight ratio" between powder cocaine and crack cocaine. Whatever the original purpose of that ratio, it has resulted, two decades later, in thousands of crack cocaine sentences which are *far* "greater than necessary" to satisfy § 3553(a)'s factors. These lengthy sentences have had a devastating impact on first-time and non-violent offenders, as well as on low-income urban areas, including predominantly African-American communities, in which these offenders live. The consequences of the 100:1 disparity are so ruinous that commentators have labeled the crack-powder disparity the modern-day Jim Crow law.

The disparity has also undermined rather than promoted federal drug-policy goals. The disparity means that first-time and non-violent crack defendants serve longer prison sentences than high-level importers and suppliers of the powder cocaine required to produce crack cocaine. It has also led federal law enforcement officials to investigate and prosecute low-level intrastate crack cases rather than solving sophisticated interstate drug operations. That distorted emphasis also has come at the expense of the states, only *one*

of which (Iowa) agrees with a 100:1 weight ratio in sentencing crack defendants.

It is therefore unsurprising, following *Booker*, that a district court facing an offender and an offense like this one, might, after *properly* weighing all of the § 3553(a) factors, impose a sentence below the Guidelines range. Several district courts, based on their experience with the Guidelines and crack cocaine defendants, have exercised their authority under *Booker* to impose below-Guidelines range sentences in crack cocaine cases like this one. So long as those courts consider all of the § 3553(a) factors in imposing a sentence, they not only comply with but faithfully adopt *Booker*.

For these reasons, the district court's decision to impose a sentence below the Guidelines range was reasonable. The court of appeals' contrary decision effectively requiring Guidelines-range sentencing in the majority of cases violates the remedial holding of *Booker*. The Court should reverse.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS VIOLATES *BOOKER* BY ELEVATING THE GUIDELINES ABOVE OTHER RELEVANT SENTENCING FACTORS.

A. District Courts Should Rely On The Guidelines Range Only As One Of Many Co-Equal Factors.

1. This Court made clear in *Booker* that a district court's authority to impose a sentence does not begin and end with the range prescribed by the Guidelines. On the contrary, the Court concluded that it was precisely the fact that the Guidelines ranges were mandatory, although subject to departures, that rendered them invalid. *See Booker*, 543 U.S. at 234. Following *Booker*, district courts must consult the Guidelines, but they must also consider *other* factors in deciding the appropriate sentence. *See Booker*, 543 U.S. at 259 (judges must "take account of the Guidelines together

with other sentencing goals" (citing 18 U.S.C. § 3553(a) (Supp. 2004)). These other factors include, although not exhaustively, the seriousness of the offense, the need for deterrence, and the history and characteristics of the defendant. *See Booker*, 543 U.S. at 268-69 (citing § 3553(a)).[2] After considering all of the pertinent factors, district courts must impose a sentence which is "not greater than necessary" to satisfy those factors. 18 U.S.C. § 3553(a).

This shift from a single relevant consideration to a large number of factors represented a watershed change in sentencing practices throughout the federal system. Properly understood, *Booker* has rendered the Guidelines just that: guidelines. *See Booker*, 543 U.S. at 264 ("The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.")

2. The decision of the Court of Appeals, however, effectively treats the Guidelines as ongoing categorical commands rather than as one of many co-equal factors a district court must consider in imposing a sentence. The Court of Appeals held, for example, that an "extraordinary variance" from the Guidelines range could only be justified by "extraordinary circumstances"—exactly the kind of circumstances the Court in *Booker* held did *not* save the

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[2] Section 3553(a) mandates that sentencing judges "impose a sentence that is sufficient but not greater than necessary" to satisfy the needs of just punishment in light of the seriousness of the offense, deterrence, incapacitation, and rehabilitation. In selecting a particular sentence, a judge must consider: the history and characteristics of the defendant and the circumstances of the offense (including mitigating history, characteristics, and circumstances, the purposes just described, and the "kinds of sentences available" (*i.e.*, the statutory maximum and minimums if any, as opposed to the kinds of sentences recommended by the Guidelines), the Guidelines range, the policy statements, the need to avoid unwarranted disparities among defendants with similar records convicted of similar conduct (not the need to avoid sentences different from the Guidelines range), and the need to provide restitution to victims, if any.

Guidelines. *Compare* Pet. App. at 3-4, *with Booker*, 543 U.S. at 234 ("The availability of a departure in specified circumstances does not avoid the constitutional issue, just as it did not in *Blakely* itself.").

The Court of Appeals also held that the district court's decision to "vary" from the Guidelines was impermissibly based in part on factors already "taken into account" by the Guidelines themselves. But the Court's decision in *Booker* clearly contemplates that district courts, after consulting the Guidelines, *may* vary from its prescribed sentencing ranges on the basis of the § 3553(a) factors, *many* of which are "taken into account," at least in part, by the Guidelines themselves. *See, e.g.*, 18 U.S.C. § 3553(a)(1) ("the nature and circumstances of the offense and the history and characteristics of the defendant"); *id.* § 3553(a)(2) ("the seriousness of the offense"). *Booker*'s command to treat the Guidelines as advisory necessarily entails authorizing district courts to "weigh" the § 3553(a) factors differently than the Commission itself weighed those same factors, so long as the resulting sentence is reasonable. Although the result is less uniformity than existed prior to *Booker*, uniformity must yield to the Sixth Amendment here. *See Booker*, 543 U.S. at 263 ("We cannot and do not claim that the use of a 'reasonableness' standard will provide the uniformity that Congress originally sought to secure.").

3. The district court properly followed the *Booker* standard and considered not only the Guidelines range, but also the other now-relevant § 3553(a) factors as well. In selecting a sentence, the district court considered petitioner's age, his family situation and assumption of familial responsibilities, his risk of re-offending, the absence of any criminal history, the small quantity of drugs involved in his offense, and his success to date in treating his drug problem. *See* Pet. at 2-3 (quoting Sent. Tr. at 23-24). While acknowledging that the Guidelines "take into account a lot of

factors," the District Court held that the low end of the range was "excessive" in light of "the circumstances involved in this case." *Id.* (quoting Sent. Tr. at 23-24). Refusing to "throw[] [Mr. Claiborne] away" for a period exceeding three years, the district court imposed concurrent 15-month sentences and three years of supervised release with drug testing and drug counseling. *Id.* at 3 (quoting Sent. Tr. at 23-24). In sum, the district court properly consulted the Guidelines and considered all of the § 3553(a) factors in selecting a sentence. And based on its considerable experience in sentencing defendants, the district court also expressly "compare[d Claiborne's] situation to that of other individuals that I have seen in this court who have committed similar crimes . . . and the sentences that they receive[d]" in determining that the Guideline-recommended range was not "commensurate" with the facts of Mr. Claiborne's case. *Id.* (quoting Sent. Tr. at 23-24). This is exactly the kind of individualized sentencing *Booker* requires.

B. Crack Cocaine Sentences Illustrate Why The Guidelines Range May Not Be Treated As "Presumptively Reasonable" In Every Case.

Although the district court's decision in *Claiborne* would have been reasonable even if the case had not involved crack cocaine, it *did* involve crack cocaine, and that fact cements the reasonableness of the district court's sentence. Mr. Claiborne was sentenced for distributing .23 grams and possessing 5.03 grams of crack cocaine.[3] As his counsel argued at sentencing, the Guidelines reflect a 100:1 weight ratio between the quantity of powder and crack cocaine necessary to trigger an equivalent penalty. Counsel urged the district court to impose a sentence below the Guidelines based, in part, on the

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[3] As the Commission has noted, five grams of crack cocaine is an amount a crack user "might consume in a weekend." United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing* 132 (Nov. 2004).

unreasonableness of this disparity. Although the district court did not base the sentence it imposed on this disparity, the sentence it imposed was reasonable, in part, because of the disproportionately severe penalties set by the Guidelines for crack cocaine cases. In at least some cases, if not many, the crack cocaine sentence ranges recommended by the Guidelines are not presumptively reasonable. Long before *Booker*, courts and commentators alike had acknowledged that crack sentences are often contrary to rational federal sentencing and drug policy. After *Booker*, a district court may conclude that the Guidelines produce unduly severe sentences even in cases involving low-level, non-violent, and first-time offenders.

1. Under the federal system, very small quantities of crack cocaine are treated as presumptive equivalents, for sentencing purposes, of quantities of powder cocaine 100 times larger. Under 21 U.S.C. § 841(b), for example, a 5-year mandatory minimum sentence is triggered by the possession of 5 grams of crack cocaine or by the sale of 500 grams of powder cocaine. A ten-year mandatory minimum sentence is likewise triggered by 50 grams of crack cocaine or 5,000 grams of powder cocaine. *Id.* This 100:1 weight ratio has been incorporated into the Guidelines and is used to set the Guidelines ranges. *See* U.S.S.G. § 2D1.1(c) (Drug Quantity Table).

Although it is obvious that the result is dramatically longer prison sentences for crack offenders than powder cocaine offenders, the 100:1 ratio may even understate the actual disparity. On average, *low*-level crack cocaine *users* receive longer sentences than *high*-level powder cocaine importers—the very *suppliers* who provide the powder cocaine which ultimately produces crack cocaine. *See* United States Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy* 63 (May 2002) [hereinafter U.S.S.C., *2002 Report to Congress*], *available at*

http://www.ussc.gov/r_congress/02crack/2002crackrpt.htm (average sentence of lowest-level crack cocaine offenders was 104 months); *id.* at 43, 45 (average sentence of highest-level powder cocaine traffickers was 101 months). Viewed on a gram-by-gram basis, street level crack dealers are punished 300 times more severely than high level cocaine powder importers. Eric E. Sterling, *Getting Justice Off Its Junk Food Diet*, White Paper (July 17, 2006), at 4, *available at* http://www.cjpf.org/Getting_Justice_Off_Its_Junk_Food_Diet.pdf; *see also* U.S.S.C., *2002 Report to Congress*, *supra*, at 63 (104-month average sentence of lowest-level crack cocaine offenders based on average of 52 grams of crack); *id.* at 43, 45 (101-month average sentence of highest-level powder cocaine traffickers based on average of 16,000 grams of powder). Crack defendants also have the longest average period of incarceration of any drug offender—approximately 120 months. *See* United States Sentencing Commission, *Sourcebook of Federal Sentencing Statistics* (2005), Fig. L [hereinafter "U.S.S.C., *Sourcebook*"], *available at* http://www.ussc.gov/ANNRPT/2005/SBTOC05.htm.

In a Special Report to Congress in 1995, the Commission used the facts of an actual federal case to illustrate the impact of the 100:1 ratio in practice. In its illustration, two "crack" defendants purchased 255 grams of powder cocaine from their higher-level supplier and cooked it, yielding 88 grams of crack cocaine they intended to distribute. The higher-level "powder" supplier was subject to a Guidelines range of 33 to 41 months for selling 255 grams of power, whereas the "crack" defendants were each subject to a range of 121 to 151 months for buying a portion of the supplier's powder and cooking it. In addition, the crack defendants faced ten-year mandatory minimums, while the supplier was not subject to any mandatory minimum. *See* United States Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 174 (Feb. 1995) [hereinafter

"U.S.S.C., *1995 Special Report*"], *available at* http://www.ussc.gov/crack/exec.htm.

2. The 100:1 ratio is not simply a sentencing disparity problem; it is a federal drug-policy problem. Two decades of experience have shown that the 100:1 ratio has resulted in a disproportionate number of low-level offenders being prosecuted for crack offenses. In 2000, barely one in five crack cocaine defendants met the criteria of a "major" or "serious" trafficker. *See* U.S.S.C., *2002 Report to Congress*, *supra*, at 39 (noting that, in 2000, approximately 73% of convicted crack cocaine offenders were "street-level" dealers, users, and the like, while only about 21% of defendants were mid-level offenders, such as as importers, suppliers, or managers, and less than 6% were the highest-level offenders). That is simply not the result Congress had in mind in establishing the Anti Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986). In imposing mandatory minimum sentences tied to drug quantities, Congress did so specifically as part of an effort to identify, target, and punish high-level offenders. The Act was intended to "create the proper incentives for the Department of Justice to direct its 'most intense focus' on 'major traffickers' and 'serious traffickers.'" H.R. Rep. No. 99-845, pt. I, at 11-12 (1986); *see also* William Spade, Jr., *Beyond the 100:1 Rationale: Towards a Rational Cocaine Sentencing Policy*, 38 Ariz. L. Rev. 1233, 1252-53 (1996) ("The decision to distinguish crack from powder [in the Act] coincided with the decision to punish 'serious' and 'major' traffickers more severely than others . . . . 'Serious' and 'major' drug traffickers were identified according to the amount of drugs with which they were apprehended.").[4]

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[4] A "major trafficker" is defined as someone who operates a manufacturing or distribution network, while a "serious trafficker" is defined as someone who manages "retail level traffic" in "substantial street quantities." H.R. Rep. No. 99-845, pt. I, at 1.

As we have explained, however, the prosecution of crack offenders has followed *precisely* the opposite course over time. *See* United States Sentencing Commission, Transcript of Public Hearing on Cocaine Sentencing Policy 40-41 (Nov. 14, 2006) [hereinafter "U.S.S.C., 2006 Public Hearing Tr."] (test. of Joseph Rannazzisi, Drug Enforcement Administration) (describing small-scale nature of crack cocaine operations generally and specifically noting that most operations involve only small numbers of ounces), *available at* http://www.ussc.gov/hearings/11_15_06/testimony.pdf. Crack prosecutions generally involve low-level and non-violent offenders—often first-time offenders—yet also generally result in long prison sentences.[5] These prosecutions have therefore turned federal drug policy on its head. After all, "*every* federal case against a street-level or local trafficker—who could be investigated and prosecuted by state and local law enforcement agencies—is a distraction from the critical federal role and a waste of federal resources." Sterling, *supra*, at 3. As Eric E. Sterling, former assistant counsel to the House Judiciary Committee and current President of the Criminal Justice Policy Foundation, has noted, "[t]he organizers of [the international drug trade] are virtually immune from investigation by county sheriffs, municipal police departments, or state narcotics bureaus. If the Department of Justice, the Department of Homeland Security and the Department of the Treasury are not focused

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[5] It is not uncommon today for federal law enforcement to insist that low-level suppliers convert powder cocaine into crack in order to set the stage for prosecution of cases involving potentially draconian crack sentences. *See, e.g.*, *United States v. Fontes*, 415 F.3d 174, 177-78 (1st Cir. 2005) (at agent's direction, informant rejected two ounces of powder defendant brought for sale and insisted on two ounces of crack); *United States v. Williams*, 372 F. Supp. 2d 1335, 1339 (M.D. Fla. 2005) ("[I]t was the government that decided to arrange a sting purchase of crack cocaine [to produce an offense level of 28]. Had the government decided to purchase powder cocaine (consistent with [defendant's] prior drug sales), the base criminal offense level would have been only 14 . . . .").

primarily on those international and national cases—*and they have not been*—then those cases are not being brought." *Id.* (emphasis in original).

Equally as troubling as the fact that federal prosecutors are focusing undue resources on low-level offenses is the fact that in doing so they are inappropriately federalizing what is properly the domain of the states: the prosecution of low-level and intrastate drug offenders. In doing so, they are also imposing a federal judgment that is inconsistent with that of 49 out of 50 states (as well as the District of Columbia). *See* U.S.S.C., *2002 Report to Congress*, *supra*, at 73 (noting that Iowa alone uses the same extreme 100:1 crack-powder ratio employed by the federal system and that every other state uses a lower ratio or makes no distinction between crack and powder cocaine). Indeed, the Commission found in 2002 that only 14 states maintain *any* "form of distinction between crack cocaine and powder cocaine in their penalty schemes." *Id.*[6] And even those states use considerably smaller differential ratios to distinguish between crack cocaine and powder cocaine offenders. *See id.* at 74-78 (summarizes ratios which range from 2:1 to 75:1, with most of these set at 10:1 or less and only two states greater than 50:1).[7]

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[6] South Carolina, one of the 14 states that distinguishes between crack and powder cocaine offenses, sometimes treats crack offenders more harshly than powder offenders and other times does the opposite. For example, a first-time crack cocaine offender has a higher statutory maximum penalty than a first-time powder cocaine offender, while a second-time powder cocaine offender is penalized more severely (5 to 30 years' imprisonment) than a second-time crack cocaine offender (0 to 25 years' imprisonment). *See* U.S.S.C., *2002 Report to Congress*, *supra*, at 78.

[7] Legal reform in Connecticut provides a recent example of the changes occurring at the state level. *See id.* at 73 (noting that, while the total number of states distinguishing between powder and crack cocaine did not change from 1995 to 2000, five of the states that did so in 1995 changed their practices, while five states that formerly did not do so, added

3. Disproportionate crack prison sentences have had a devastating impact not only on first-time and non-violent offenders, but on their families and communities, particularly in poor urban areas. As one commentator recently noted, the federal policy of "stringent crack sentencing has not abated or reduced cocaine trafficking, nor improved the quality of life in deteriorating neighborhoods. What it has done, however, is incarcerate massive numbers of low-level offenders . . . ." U.S.S.C., 2006 Public Hearing Tr., *supra*, at 297 (test. of Nkechi Taifa, Senior Policy Analyst, Open Society Policy Center).

Tragically, a vastly disproportionate number of those incarcerated low-level drug offenders are African-American.[8] "The number of black federal crack defendants is ten times the number of white defendants." Sterling, *supra*, at 1. "In 2002, 81 percent of the offenders sentenced for trafficking the crack form of cocaine were African American." United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing* 131 (Nov. 2004) [hereinafter "U.S.S.C., *Fifteen*

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it). Connecticut enacted legislation that eliminates the disparate treatment of crack and powder cocaine quantities for purposes of the mandatory minimum penalties that are imposed. *See* 2005 Conn. Pub. Acts 248 (Reg. Sess.); *see also* http://www.thealliancect.org/cc_sentencing.html.

[8] As of 2005, one in twelve African-American men in their late twenties was incarcerated. *See* Paige M. Harrison & Allen J. Beck, *Prisoners in 2005*, Bureau of Justice Statistics, at 8 (2006). In addition, if current trends continue, one in three black males born today will spend some portion of his adult life incarcerated in a state or federal prison. *See* Thomas P. Bonczar, *Prevalence of Imprisonment in the U.S. Population, 1974-2001*, Bureau of Justice Statistics, at 8 (2003). "[T]he black community as a whole suffers a comparative disadvantage when many of its young men spend their formative years behind bars . . . ." Matthew F. Leitman, *A Proposed Standard of Equal Protection Review for Classifications Within the Criminal Justice System That Have a Racially Disparate Impact: A Case Study of the Federal Sentencing Guidelines' Classification Between Crack and Powder Cocaine*, 25 U. Tol. L. Rev. 215, 231 (1994).

Years"], *available at* http://www.ussc.gov/15_year/15year.htm.[9] As a result, crack cocaine penalties help explain the enormous racial gap in sentences being served by black and white inmates in the federal penal system. Raising the crack cocaine threshold from 5 grams to 25 grams alone would "reduce the gap in average prison sentences between Black and White offenders by 9.2 months." *Id.* at 132. The existing problem is so severe that commentators have labeled the federal crack cocaine disparity the "new Jim Crow" law. Tr. of "Social Justice and the War on Drugs" (morning panel II) (Oct. 4, 2000) (statements of Hon. Robert Sweet and former Baltimore mayor Kurt Schmoke), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/drugs/symposium/panel2.html.

The costs of draconian crack sentences are borne not only by "deteriorating neighborhoods" but by taxpayers forced to shoulder the bill for offenders serving "inordinately lengthy sentences at an enormous cost." U.S.S.C., 2006 Public Hearing Tr., *supra*, at 297 (test. of Nkechi Taifa, Senior Policy Analyst, Open Society Policy Center). Lengthy sentences for low-level, first-time offenders contribute substantially to the growing federal prison overcrowding problem. *See* Marc Mauer, *Race to Incarcerate* 167-69, 172 (2d ed. 2006) (documenting rise in number of prisoners and particularly those incarcerated for drug offenses); *see also id.* at 162 ("[L]aw enforcement is more likely to target cocaine users or crack cocaine users.").[10]

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[9] The strong racial correlation of federal crack defendants exists despite the fact that "whites comprise a majority of crack users." Marc Mauer, *Race to Incarcerate* 172 (2d ed. 2006).

[10] Furthermore, in terms of the risk of recidivism, "[t]he folly of using expensive prison space for drug offenders, even traffickers, has been documented in research conducted on the federal prison population." Mauer, *supra*, at 172. Using data that showed the recidivism rates for comparable group of offenders released from prison in 1987, the study

4. Against the catastrophic nature of these problems, the original justifications for the 100:1 ratio cannot remotely survive two decades' worth of careful scrutiny. The most often cited rationale for the 100:1 ratio is the false perception that there are tangible differences between the two substances. *See, e.g.*, 132 Cong. Rec. 26,447 (1986) (statement of Sen. Chiles) (stating that disparate "treatment is absolutely essential because of the especially lethal characteristics of this [crack] form of cocaine"). However, a high-level representative from the U.S. Department of Health & Human Services recently debunked that myth by testifying that "the pharmacological effects of cocaine are the same, regardless of whether it is in the form of cocaine hydrochloride [powder] or crack cocaine, the base." U.S.S.C., 2006 Public Hearing Tr., *supra*, at 166 (test. of Dr. Nora D. Volkow, Director, Nat'l Inst. on Drug Abuse, Nat'l Institutes of Health, U.S. Dept. of Health & Human Servs.). The Commission has likewise noted that the differential treatment cannot be justified based upon this alleged difference. *See* U.S.S.C., *Fifteen Years*, *supra*, at 132.[11]

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showed that "only 19 percent of the low-risk drug traffickers [*i.e.*, more than 30 percent of the total federal drug prisoner population] were re-arrested during the three years after release, and that none of those arrested were charged with serious crimes of violence." *Id.* at 172-73.

[11] The Commission noted in particular that:

> [T]he harms associated with crack cocaine do not justify its substantially harsher treatment compared to powder cocaine. . . . Powder cocaine that is smoked is equally addictive as crack cocaine, and powder cocaine that is injected is more harmful and more addictive than crack cocaine . . . . Recent research has demonstrated that some of the worst harms thought to be associated with crack cocaine use, such as disabilities associated with pre-natal cocaine exposure, are not as severe as initially feared and no more serious than crack cocaine exposure than from powder cocaine exposure.

U.S.S.C., *Fifteen Years*, *supra*, at 132.

The other original justification for the 100:1 ratio was the perception that crack cocaine is uniquely correlated to more serious crimes. *See* U.S.S.C., *1995 Special Report*, *supra*, at 118-19 (observing that "the correlation between crack cocaine use and the commission of other serious crimes was considered greater than that with other drugs"). This presumption, too, has been refuted. "More recent data indicate that significantly less trafficking-related violence or systemic violence . . . is associated with crack cocaine trafficking offenses than previously assumed." U.S.S.C., *2002 Report to Congress*, *supra*, at 100 (for example, in 2000, only 2.3% of crack cocaine offenders used a weapon); *see also* U.S.S.C., 2006 Public Hearing Tr., *supra*, at 226-27 (test. of Profs. Jonathan Caulkins & Peter Reuter) (crack cocaine violence has declined over time because the average age of crack users has increased).[12] And that is to say nothing of the problem we have already identified that the 100:1 ratio results in lengthier sentences for low-level crack users than for the very high-level powder cocaine dealers who supply the drugs needed to convert powder cocaine into crack cocaine.

6. The Sentencing Commission agrees. One of the Commission's statutory duties is to monitor the operation of the Guidelines and federal sentencing system and to propose amendments to Congress for appropriate modifications. *See* 28 U.S.C. § 994. For over a decade, the Commission has urged Congress to eliminate the 100:1 ratio.

In 1995, the Commission released a report concluding that congressional objectives with regard to punishing crack cocaine trafficking can be achieved more effectively without relying on a federal sentencing scheme that includes the 100:1 quantity ratio. *See* U.S.S.C., *1995 Special Report*, *supra*, at

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[12] In any event, district courts will, of course, impose higher penalties in cases involving violence, regardless of the type of drug at issue in the underlying offense. *See, e.g.*, U.S.S.G. §§ 2D1.1(b)(1), 2K2.1(b)(6) (weapons enhancements).

198-200. In reaching this conclusion, the Commission noted that the ratio punishes low-level crack offenders more harshly than wholesale powder distributors. *See id.* at 150-51. The Commission also cited the disproportionate impact of the policy on African-American defendants. *See id.* at 192.

In 1997, the Commission returned to Congress with a report once again recommending a modification to the 100:1 ratio. *See* United States Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 2 (Apr. 1997), *available at* http://www.ussc.gov/r_congress/NEWCRACK.PDF; *see also id.* at 9 ("[A]s the Commission reported in 1995, we again unanimously conclude that congressional objectives can be achieved more effectively without relying on the current federal sentencing scheme for cocaine offenses that includes the 100-to-1 quantity ratio."). This time, the Commission focused on the disproportionality of crack cocaine sentences to the measured harm to society from the use and sale of the drug. *See id.* at 9. Specifically, the Commission stated that, in its view, "federal sentencing policy should reflect federal priorities by targeting the most serious offenders in order to curb . . . drug trafficking and violent crime," and noted that "current federal cocaine policy inappropriately targets limited federal resources by placing the quantity triggers for the five-year minimum penalty for crack cocaine too low." *Id.* at 7.

Even more recently, the Commission has reiterated its position, having specifically singled out the crack-powder disparity as a category having an "adverse [racial] impact," U.S.S.C., *Fifteen Years*, *supra*, at 131. Accordingly, the Commission concluded, "[r]evising the crack cocaine thresholds would . . . dramatically improve the fairness of the federal sentencing system." *Id.* at 132. The Commission's concern stems from its central mission, as articulated by the relevant enabling statutes. Section 991(b)(1)(B) of Title 28, for example, mandates that the Commission "provide

certainty and fairness in meeting the purposes of sentencing, avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices."[13]

C. The Sentence Imposed By The District Court Was Not Unreasonable.

1. Even if this case did not involve a crack cocaine defendant, the district court's decision would have reasonable, and the Courts of Appeals' decisions should be reversed. Indeed, the district court acted precisely as it was supposed to in following this Court's *Booker* decision.

But even if the Court were otherwise inclined to decide that the actual sentencing decision reached by the district court might be *un*reasonable in some other context, the fact that this case involved a crack cocaine offense renders the district court's sentence reasonable here. For the reasons identified above, the 100:1 ratio and its various effects impact many of the § 3553(a) factors a district court is *required* to consider in selecting a sentence. *See* 18 U.S.C. § 3553(a)(1) ("the nature and circumstances of the offense and the history and characteristics of the defendant"); *id.* § 3553(a)(2)(A) ("seriousness of the offense;" "just punishment for the offense"); *id.* § 3553(a)(2)(C) ("protect the public from further crimes of the defendant"); *id.* § 3553(a)(2)(D)

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[13] Although Congress has acknowledged the criticism of the 100:1 powder-to-crack ratio in asking the Commission to make recommendations regarding whether it should eliminate or reduce the disparity, it has failed to act despite the Commission's recommendations. *See, e.g.*, Pub. L. No. 104-38, § 1, 109 Stat. 334, 334 (1995) (rejecting Commission's recommendations); *see also United States v. Pho*, 433 F.3d 53, 56 (1st Cir. 2006) (reporting congressional inaction in face of Commission's recommendations since 1995).

("provide the defendant with needed educational or vocational training, [or] correctional treatment in the most effective manner"); *id.* § 3553(a)(6) ("the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct").

Indeed, in a case like petitioner's, involving a first-time offender, a non-violent offense, and small quantities of cocaine, the district court would not have acted reasonably by imposing a Guidelines sentence. But even if a greater sentence would arguably have been reasonable, the sentence actually imposed here—which was still much greater than the sentence would have been had petitioner been caught with powder rather than crack cocaine[14]—certainly was not *unreasonable*, the relevant standard under *Booker*. *See Booker*, 543 U.S. at 765 (court of appeals' review limited to question whether the sentence imposed by the district court was "unreasonable, having regard for . . . the factors . . . set forth in [§ 3553(a)]; and . . . the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of [§ 3553(c)]").

2. Other federal courts have similarly concluded since *Booker* was decided that sentences imposed below the Guidelines range may be appropriate in crack cocaine cases. In *United States v. Fisher*, for example, the district court determined that the Guidelines range applicable to a crack cocaine defendant "substantially overstat[ed] the seriousness of the offense" following an analysis that discussed past criticisms of the 100:1 ratio. 2005 WL 2542916 (S.D.N.Y. Oct. 11, 2005), at *4-*7.[15] As another district court summed

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[14] As defense counsel pointed out to the sentencing judge, had petitioner been prosecuted for a total of 5.26 grams of powder cocaine, rather than crack, the applicable Guidelines range would have been 6 to 12 months. *See* Pet. at 2.

[15] The Second Circuit has recently concluded that it may not adopt a weight ratio other than the 100:1 ratio prescribed by Congress, and

up, "[t]he growing sentiment in the district courts is clear" that the 100:1 ratio "cannot withstand . . . scrutiny" under § 3553(a). *United States v. Perry*, 389 F. Supp. 2d 278, 307 (D.R.I. 2005).[16]

Likewise, several judges on various courts of appeals have made the point that, following *Booker*'s mandate that judges consider all of the factors listed under § 3553(a), "a sentencing court is not only *permitted* but is *required* to evaluate the propriety of applying the 100:1 crack-cocaine ratio in a particular case." *United States v. Williams*, __ F.3d __, 2006 WL 3615300, at *13 (11th Cir. Dec. 13, 2006) (Barkett, J., dissenting from denial of rehearing *en banc*) (emphases in original). As another judge specifically noted, the Commission's findings with respect to the effects of the 100:1 ratio "can help sentencing courts analyze the § 3553(a) factors . . . . The Commission's findings, in other words, can be considered insofar as they are *refracted through* an individual defendant's case." *United States v. Eura*, 440 F.3d 625, 637 (4th Cir. 2006) (Michael, J., concurring) (emphasis in original); *see also United States v. Gunter*, 462 F.3d 237, 249 (3d Cir. 2006) ("district courts may consider the crack/powder cocaine differential in the Guidelines as a factor, but not a mandate, in the post-*Booker* sentencing process"). As these judges have correctly articulated, below-Guidelines range sentences may be—indeed, often *will* be—reasonable in many crack cocaine cases following *Booker*.

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expressly mentioned both the *Fisher* and *Perry* district court opinions (discussed above) as having indicated disagreement with the ratio. *See United States v. Castillo*, 460 F.3d 337, 352-53 (2d Cir. 2006). The court nonetheless expressly noted that it "did not express any opinion on the reasonableness of [either] of those sentences in light of the specific facts involved in those cases." *Id.* at 353 n.4.

[16] In fact, a substantial number of district courts have issued opinions with similarly explicit discussions since *Booker*. *See, e.g.*, *United States v. Clay*, 2005 WL 1076243 (E.D. Tenn. May 6, 2005); *United States v. Nellum*, 2005 WL 300073 (N.D. Ind. Feb. 3, 2005).

3. Nor is there any reason to fear that the *Booker* standard, properly employed, confers unlimited discretion on sentencing judges. Courts still must weigh all the factors and arrive at a sentence that is reasonable in light of that analysis. Moreover, many federal statutes contain mandatory minimums, and in such cases judges will have a starting point they cannot go below. *See, e.g.*, 12 U.S.C. § 630 (minimum of 2 years' imprisonment for embezzlement, fraud, or false entries by a bank officer); 18 U.S.C. § 225 (minimum of ten years' imprisonment for organizing, managing, or supervising a continuing financial crimes enterprise); 18 U.S.C. § 2251(d) (minimum of five years' imprisonment for a second offense of sexually exploiting a minor). *Cf. Harris v. United States*, 536 U.S. 545, 557 (2002) (upholding judicial fact-finding that increased statutory minimum sentence). In crack cocaine cases, in particular, unless and until Congress revisits the current mandatory minimum regime of 5 (and 10) years for 5 (and 50) grams of crack, minimum sentences will be triggered in approximately 80% of all crack cocaine cases. *See* U.S.S.C., *Sourcebook*, *supra*, at 106, 324.

At the same time, however, many sentencing judges will of course encounter facts like the ones at issue in petitioner's case (or other fact patterns equally deserving of lighter sentences than the Guidelines range would permit). As noted above, not only were the quantities relatively low, but Mr. Claiborne had no previous criminal record and was specifically found to be at a low risk of recidivism by a district court judge evaluating him in person and from the vantage point of experience. The multitude of relevant § 3553(a) factors implicated by the facts of Claiborne's case all pointing toward a relatively short sentence in order to avoid imposing a sentence "greater than necessary." The district court's sentence was well within its discretion following *Booker*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Dated: December 18, 2006